IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MONTRELL GARY	**CRIMINAL ACTION**
v.	**NO. 96-181-2**
UNITED STATES OF AMERICA	**CIVIL ACTION**
	NO. 99-3820

M E M O R A N D U M

Broderick, J. **February 10, 2000**

Petitioner Montrell Gary ("Gary") is currently serving a sentence of 210 months imprisonment after being convicted in this Court of possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and aiding and abetting, in violation of 18 U.S.C. § 2. Presently before the Court is Gary's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 ("§ 2255"). In his § 2255 motion, Gary contends that he was denied effective assistance of counsel because his counsel: (1) advised him to stipulate at trial that the controlled substance at issue was "crack" cocaine and (2) failed to request Jencks Act material. Also before the Court is Gary's motion for appointment of counsel which was filed contemporaneously with his reply in further support of his § 2255 motion. For the reasons set forth below, Gary's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 will be denied. Because Gary has already filed a reply to the government's response to his § 2255 motion, the Court will dismiss as moot Gary's motion for additional time to reply.

Because the Court has determined that no further proceedings are necessary to the determination of Gary's motion, the Court will dismiss his motion for appointment of counsel as moot.

I. BACKGROUND

On April 24, 1996 Gary and Alfred Dover ("Dover") were indicted by a Federal Grand Jury in the Eastern District of Pennsylvania on possession with intent to distribute approximately 220 grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1), and aiding and abetting, in violation of 18 U.S.C. § 2. Dover was also charged with use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c), and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). A jury trial commenced on November 20, 1996. A mistrial was declared by the Court on November 25, 1996 as to all counts of the indictment because the jury was unable to reach a verdict. Retrial commenced on February 4, 1997. At trial, Gary stipulated that the drugs were "cocaine base, commonly known as 'crack'" and that a proper chain of custody was maintained. Trial transcript of Feb. 5, 1997 at 174-175. On February 7, 1997, a jury convicted Gary and Dover of all counts. No post-trial motions were filed.

The Court held a sentencing hearing for Gary on July 1, 1997 in open court with Gary and his counsel present. After hearing argument from Gary's counsel and the government, the Court declined to adopt in full the guidelines application and factual findings in the presentence report. Rather, the Court refused to apply a two-level enhancement pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 2D1.1(b)(1) for possession of a firearm in relation to a drug trafficking offense. The Court did, however, apply a two-level adjustment pursuant to U.S.S.G. § 3C1.1,

finding that Gary had obstructed justice by committing perjury in the course of his testimony at trial.

Despite Gary's stipulation at trial that the drugs were "crack," at the sentencing hearing the government presented the testimony of Zachariah Cherian ("Cherian"), a chemist employed with the Philadelphia police chemistry lab who testified that he analyzed the drugs. Sentencing transcript at 20-24. Cherian testified that his analysis showed that there were approximately 209 grams of a chunky white substance containing cocaine base and sodium bicarbonate. Sentencing transcript at 22-23. Cherian also testified that the drugs had been previously analyzed by James Schiller and that Schiller's findings were consistent with his own. Sentencing transcript at 23. The government also presented the testimony of Wilbert Kane ("Kane"), a narcotics officer employed by the Philadelphia Police Department and assigned to the Drug Enforcement Administration task force in Philadelphia. Sentencing transcript at 30; Trial transcript of Feb. 5, 1997 at 161-162. Kane examined the drugs presented by the government and identified them as cocaine base, which is known on the street as "crack," based upon the chunky white appearance of the drugs. Sentencing transcript at 31-34.

Based upon the evidence presented by the government at the sentencing hearing, the Court made a finding that Gary possessed 208 grams of crack cocaine. Sentencing transcript at 35. The Court, after hearing from Gary, defense counsel, and the government, then sentenced Gary to a term of 210 months imprisonment to be followed by five years of supervised release. Sentencing transcript at 45. This sentence constituted the bottom of the guideline range based on Gary's offense level and criminal history category.

Gary appealed to the United States Court of Appeals for the Third Circuit. On appeal,

Gary challenged only this Court's imposition of a two-level increase to his offense level under the United States Sentencing Guidelines based upon this Court's finding that Gary committed perjury at trial. The Third Circuit affirmed the judgment of conviction and sentence in an unpublished opinion on July 7, 1998. United States v. Gary, No. 97-1537, 159 F.3d 1353 (3d Cir. July 7, 1998) [table]. The Third Circuit's judgment was docketed in the District Court on August 4, 1998. No petition for a writ of certiorari to the United States Supreme Court was filed.

Gary filed the instant pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 on July 29, 1999. By Order dated August 26, 1999, the Court directed the government to file a response to Gary's motion on or before September 20, 1999. Upon request of the government, the time for the government to file a response was extended to October 4, 1999. The government filed its response on October 4, 1999. Gary filed a reply in further support of his motion on December 16, 1999, along with a motion for appointment of counsel.

II. DISCUSSION

Under 28 U.S.C. § 2255, a prisoner in Federal custody may claim a right to be released on the ground that his sentence was "imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence...." 28 U.S.C. § 2255. The motion is first addressed to the sentencing court which must serve notice of the petition on the United States and grant a prompt hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. Rule 8(a) of the Rules Governing § 2255 proceedings provides that the Court shall determine whether an evidentiary hearing is required for the disposition of a § 2255 petition. The Court must only hold

a hearing to determine the truth of the allegations where the petition raises an issue of material fact. See, e.g., United States v. Essig, 10 F.3d 968, 976 (3d Cir. 1993). Gary's motion, the government's response thereto, and Gary's reply currently being before the Court, the Court has examined the record in this case and has determined that an evidentiary hearing is not required in view of the fact that all of Gary's claims can properly be disposed of on the basis of the record. Government of the Virgin Islands v. Bradshaw, 726 F.2d 115, 117 (3d Cir. 1984), as modified by United States v. Dawson, 857 F.2d 923, 927 (3d Cir. 1988).

Ineffective assistance of counsel claims are governed by the two-part standard enunciated by the United States Supreme Court in Strickland v. Washington:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or [] sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687 (1984). To prove the first element, the defendant must identify specific acts or omissions committed by counsel and demonstrate that, in light of these actions, "counsel's performance was deficient." Strickland, 466 U.S. at 687. In doing so, the defendant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (quotation omitted).

A court examining the first element of an ineffective assistance of counsel claim must ask "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 690. This inquiry will require the court to "judge the reasonableness of counsel's

challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. Only if the court determines that "the identified acts or omissions were outside the wide range of professionally competent assistance," will the defendant prevail as to the first element. Id.

To meet the second part of the test, a defendant claiming ineffective assistance of counsel must demonstrate that counsel's "deficient performance prejudiced the defense." Strickland, 466 U.S. at 690. Even if the defendant demonstrates that counsel committed an unreasonable error, a court will not set aside the judgment against the defendant "if the error had no effect on the judgment." Strickland, 466 U.S. at 691. The defendant claiming ineffective assistance of counsel has a heavy burden with respect to showing prejudice because "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Gary argues that he was denied effective assistance of counsel in two ways. First, he alleges that his counsel was ineffective in advising him to stipulate at trial that the drugs presented by the government were "crack" cocaine. Second, Gary alleges that his trial counsel was ineffective for not requesting Jencks Act material from the government at trial. The Court will construe Gary's pro se § 2255 motion liberally pursuant to Haines v. Kerner, 404 U.S. 519, 520 (1972), and will address each of Gary's arguments in turn.

A. Stipulation that the substance was "crack" cocaine

Gary contends that his counsel was ineffective for advising him to stipulate at trial that the controlled substance at issue was "crack" cocaine rather than another form of cocaine base. Gary contends that, had he not entered into such a stipulation, he would not have received the higher sentence provided for in the guidelines for "crack" and, instead, would have received a sentence in the range of 33 to 44 months imprisonment. Gary alleges that the drugs were variously analyzed as "testing positive for cocaine," "cocaine base," "cocaine base with bicarbonate salt," and "cocaine base with sodium bicarbonate" but never found to contain "cocaine hydrochloride and sodium bicarbonate." § 2255 motion at 9-11.

Section 2D1.1 of the United States Sentencing Guidelines, under which Gary was sentenced, provides that the court use the same base offense level for a crime involving at least 150 grams but less than 500 grams of cocaine base that it would for a crime involving at least 15 kilograms but less than 50 kilograms of cocaine. U.S.S.G. § 2D1.1(c)(3). "Thus, an enhanced sentence or '100:1' ratio exists in crimes involving cocaine base, compared to cocaine, as defined in the Guidelines." United States v. James, 78 F.3d 851, 855 (3d Cir. 1996). In 1993, the United States Sentencing Commission amended U.S.S.G. § 2D1.1 to include the following definition of cocaine base:

> "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form."

U.S.S.G. § 2D1.1.

In United States v. James, 78 F.3d 851 (3d Cir.), cert. denied, 519 U.S. 844 (1996), the

Third Circuit held that the above definition of "cocaine base" provided in U.S.S.G. § 2D1.1 was intended to create a distinction between "crack" cocaine and other forms of "cocaine base." 78 F.3d at 858. In light of this distinction, the Third Circuit held that the enhanced sentencing provisions in U.S.S.G. § 2D1.1 should only apply to the "crack" form of "cocaine base." James, 78 F.3d at 858. Accordingly, the Third Circuit held that the government must prove by a preponderance of the evidence that "crack" cocaine was the form of cocaine base involved in the charged transaction before the court may apply the enhanced sentencing provisions. James, 78 F.3d at 858. The identity and the amount of the controlled substance must be determined by the court at the time of sentencing, rather than by the jury at the time of trial. United States v. Lewis, 113 F.3d 487, 490 (3d Cir. 1997), cert. denied, 523 U.S. 1108 (1998).

In analyzing a claim of ineffective assistance of counsel, the United States Supreme Court has held that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland v. Washington, 466 U.S. 668, 697 (1984). In fact, the Third Circuit has "read Strickland as requiring the courts to decide first whether the assumed deficient conduct of counsel prejudiced the defendant." McAleese v. Mazurkiewicz, 1 F.3d 159, 170 (3d Cir. 1993) (quotation omitted). Therefore, the Court will, for the purpose of this motion, assume that Gary's trial counsel was deficient in advising him to stipulate at trial that the drugs were "crack" and proceed to consider whether or not Gary was prejudiced by that stipulation.

Gary argues that he was prejudiced by the stipulation that the drugs were "crack" because this Court relied on the stipulation in determining that the drugs were "crack" at the time of sentencing and the evidence demonstrates that the drugs were not, in fact, "crack." After a

thorough review of the record, the Court has determined that these contentions are meritless.

First, it is clear that the Court relied upon the testimony at sentencing to determine both the identity and weight of the drugs. In fact, the Court directed the government to put on evidence as to identity and weight of the drugs at sentencing if the government sought to have the Court apply the enhanced sentence for "crack." Sentencing transcript at 3-5. Both Zachariah Cherian, a police department chemist, and Wilbert Kane, a Philadelphia police officer assigned to the Drug Enforcement Administration task force in Philadelphia, testified on behalf of the government at sentencing. Cherian testified that he analyzed the drugs and found the chunky, white substances contained either "cocaine base and [] sodium bicarbonate" or "cocaine base and bicarbonate salt." Sentencing transcript at 22. Gary's counsel cross-examined Cherian extensively as to his method of analysis regarding the drugs, particularly the method used to calculate the weight of the drugs. Sentencing transcript at 24-28. Kane testified that, based upon the chunky, white appearance, the drugs were the form of cocaine base known on the street as "crack." Sentencing transcript at 31-34. Gary's counsel cross-examined Kane about his conclusion that the drugs were "crack" as opposed to some other form of cocaine base. Sentencing transcript at 32-34. Based upon this testimony, the Court found that Gary possessed 208 grams of "crack." Sentencing transcript at 35. Therefore, Gary's contention that the he was prejudiced because the Court relied on his stipulation in sentencing him for possession of "crack" is unsupported by the record and must be rejected.

Similarly, Gary's contention that the evidence did not show that the drugs were "crack" is not supported by the record. Cherian testified that the drugs were cocaine base and sodium bicarbonate. Sentencing transcript at 22. Cherian also described the drugs as a chunky, white

substance. Sentencing transcript at 22. Although Cherian never used the word "crack" in describing the drugs, the Court finds that the substance identified in his analysis meets the definition of "crack" in U.S.S.G. § 2D1.1. In addition, Kane testified specifically that the drugs were "crack." Sentencing transcript at 31-32. The Third Circuit has previously held that Officer Kane's testimony that the drugs in question were "crack" based upon their appearance and packaging was sufficient to meet the government's burden of proving the identity of the drugs at sentencing. United States v. Roman, 121 F.3d 136, 141 (3d Cir. 1997), cert. denied, 522 U.S. 1061 (1998). Here, however, the Court did not merely rely on Kane's testimony but also relied on the testimony of the chemist that the analysis of the drugs was consistent with the definition of "crack' contained in the Sentencing Guidelines. Finally, on direct appeal by Gary's co-defendant, Dover, the Third Circuit held that this Court did not err in determining that the government had proved by a preponderance of the evidence, based upon the testimony of Cherian and Kane, that the substance was "crack." United States v. Dover, No. 97-1536, 159 F.3d 1353 (3d Cir. July 7, 1998) [table].

Because the record conclusively demonstrates that Gary is unable to show any prejudice resulting from his counsel's allegedly deficient performance in advising him to stipulate at trial that the drugs were "crack," the Court has determined that no further proceedings are necessary and Gary's ineffective assistance of counsel claim regarding the stipulation will be rejected.

B. Failure to Request Jencks Act materials

Gary also alleges that his counsel was ineffective because the docket of proceedings demonstrates that counsel never filed a motion for Jencks Act materials at trial. He alleges that,

if such material had been requested, it could have contained inconsistent statements which could have been used in cross-examination of the government's witnesses at trial and weakened the credibility of those witnesses.

The Jencks Act, 18 U.S.C. § 3500, states, in relevant part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified....
>
> (e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means --
>
> > (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> >
> > (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
> >
> > (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500. In addition, Federal Rule of Criminal Procedure 26.2, entitled "Production of Witness Statements," provides, in relevant part:

> (a) **Motion for Production**. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witnesses, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.
>
> (f) **Definition**. As used in this rule, a "statement" of a witness means:
> > (1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;
> > (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral

> statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or
> (3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

Fed. R. Crim. P. 26.2. Thus, both Rule 26.2 and the Jencks Act provide a criminal defendant an opportunity to obtain previous statements of government witnesses who testify at trial. However, under both Rule 26.2 and the Jencks Act, the defendant is required to make a motion at or before the time of trial in order to be entitled to receive the prior statements of the government witnesses under these provisions.

When the allegedly ineffective assistance of counsel relates to matters which occurred during trial, the court deciding the issue of prejudice must determine "whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting [the defendant's] guilt." Strickland v. Washington, 466 U.S. 668, 695 (1984). Once again the Court will assume, for the purpose of this motion, that the performance of Gary's counsel at trial was deficient and examine whether or not Gary can demonstrate that he was prejudiced by such allegedly deficient performance. See McAleese v. Mazurkiewicz, 1 F.3d 159, 170 (3d Cir. 1993).

The record in this case does not reveal that a motion for Jencks Act materials was ever filed by Gary's counsel. Nonetheless, the record clearly demonstrates that Gary's claim must be rejected as meritless without the need for further proceedings because Gary cannot demonstrate that he suffered any prejudice as a result of counsel's failure to file such a motion.

In response to Gary's § 2255 motion Assistant United States Attorney Joan L. Markman ("Markman") filed an affidavit asserting that all discoverable material was provided to Gary's

counsel prior to Gary's first trial. Govt. response, Ex. 1 at ¶¶ 2, 3. Markman's affidavit asserts that only one witness, Officer Sandra Haines, testified before the grand jury. Id. at ¶ 3. Markman's affidavit further asserts that Officer Haines' testimony before the grand jury was confined to summarizing "the statements of other witnesses whose prior statements [Markman] had provided to [Gary's counsel] in discovery before the first trial." Id. at ¶ 3. Ms. Haines did not testify at either trial and thus her grand jury testimony was not discoverable under either the Jencks Act or Federal Rule of Criminal Procedure 26.2. In addition, the Court has carefully reviewed the transcripts of both trials in this case. The record demonstrates that, at the suppression hearing and at both trials, the government witnesses were cross-examined extensively by Gary's counsel on the basis of their previous statements. Therefore, the record clearly demonstrates that Gary's counsel was provided with the previous statements of these witnesses prior to the in-court testimony of the witness at each of Gary's trials.

Gary has provided the Court with no evidence to suggest that statements of witnesses exist which were not provided because of his counsel's failure to file a motion under the Jencks Act and which would create a "reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting [the defendant's] guilt." Strickland v. Washington, 466 U.S. 668, 695 (1984). Instead, Gary asks this Court to infer bad faith and prosecutorial misconduct from the fact that the case file is now missing from the United States Attorney's Office. Markman, in her affidavit, asserts that administrative personnel at the United States Attorney's Office are unable to find the case file in storage at this time. Govt. response, Ex. 1 at ¶ 5. The Court declines to infer any wrongdoing. Although it is certainly the case that the government has an obligation under some circumstances to preserve evidence, see, e.g., Arizona

v. Youngblood, 488 U.S. 51 (1988); California v. Trombetta, 467 U.S. 479 (1984); United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991), the Court is aware of no authority, and Gary has suggested none, that the government has an obligation to preserve discovery materials once the defendant has been convicted and his direct appeals exhausted. The Court, therefore, refuses to find any significance whatsoever in the fact that the previous statements of the government witnesses are not available at this time where the record demonstrates that those statements were made available to defense counsel prior to trial.

Similarly, the Court declines to find prejudice to Gary from the mere fact that no motion for Jencks Act material was filed by Gary's counsel at trial. The Court is aware of no authority, and Gary has suggested none, requiring defense counsel to file a motion to obtain Jencks Act material in view of the fact that the statements of the government witnesses were provided to defense counsel prior to the suppression hearing held immediately prior to Gary's first trial. The Court has determined that Gary has been unable to show that he has suffered any prejudice from his counsel's alleged deficiency in not filing a motion for Jencks Act materials. Therefore, the Court will deny Gary's claim for ineffective assistance of counsel without the need for further proceedings.

III. CONCLUSION

Having found that Gary has not demonstrated that he was prejudiced by his counsel's allegedly ineffective assistance, the Court will deny Gary's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Because the Court has determined that it need not hold a hearing as the record conclusively demonstrates that he is not entitled to relief and thus no

further proceedings are necessary to the resolution of Gary's motion, the Court will dismiss as moot Gary's motion for appointment of counsel. The Court will also dismiss as moot Gary's motion for leave to file a reply in further support of his § 2255 motion because he has already filed such a reply.

Finally, the Court will deny Gary a certificate of appealability. Under 28 U.S.C. § 2253(c)(1)(B), to appeal a final order in a proceeding under 28 U.S.C. § 2255, the petitioner must first obtain a certificate of appealability. This certificate of appealability may be issued by a district court judge. See United States v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997). The certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court has determined that Gary has failed to demonstrate that he is entitled to a certificate of appealability. Therefore, Gary will not be granted leave to appeal this decision.

An appropriate Order follows.

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ORDER

AND NOW, this 10th day of February, 2000; Petitioner Montrell Gary ("Gary") having filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255; the government having filed a response thereto and Gary having filed a reply; Gary also having filed, contemporaneously with his reply, a motion for appointment of counsel; the Court, after liberally construing Gary's motion pursuant to 28 U.S.C. § 2255, for the reasons stated in this Court's memorandum of the same date, having determined that further proceedings on the motion are not required and that Gary has not shown that he was prejudiced by the allegedly ineffective assistance of his counsel;

IT IS ORDERED that Gary's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 150) is **DENIED**;

IT IS FURTHER ORDERED that Gary's motion for an extension of time in which to file a reply (Doc. No. 158) is **DISMISSED AS MOOT**;

IT IS FURTHER ORDERED that Gary's motion for appointment of counsel (Doc. No.

159) is**DISMISSED AS MOOT**

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. 2253(c)(2) a certificate of appealability is **DENIED** in that Gary has not made a substantial showing of the denial of a constitutional right.

RAYMOND J. BRODERICK, J.